No. 87-998

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC. ("MBELDEF") AND THE LOUISIANA ASSOCIATION OF MINORITY AND WOMEN OWNED BUSINESSES, INC. ("LAMWOB") AS AMICI CURIAE IN SUPPORT OF APPELLANT

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[1] Amici MBELDEF and LAMWOB file this brief pursuant to the letters of consent lodged with the Clerk of the Court.

INTEREST OF AMICI CURIAE

Amicus Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF"), a non-profit corporation, was founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote minority business opportunity programs. MBELDEF is comprised of over 800 minority businesses nationwide, many of which, in their efforts to become successful commercial enterprises, have benefited from federal, state, and local minority business opportunity programs. MBELDEF has provided numerous state and local governments with legal guidance in the adoption of such programs and has participated in

significant litigation concerning these programs.[2]

Amicus Louisiana Association of Minority and Women Owned Businesses, Inc. ("LAMWOB") is a not-for-profit corporation organized in 1988 to promote minority business opportunity programs within the State of Louisiana. LAMWOB's membership consists of, but is not limited to, contractors that have been certified to participate in a federal program for socially and economically disadvantaged businesses and therefore derive their livelihood, at least in part, from minor-

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[2] Most recently, MBELDEF has appeared as intervenor-appellee before the United States Court of Appeals for the Sixth Circuit in Tennessee Asphalt Co. v. Farris, No. 87-5588 (6th Cir. argued Mar. 31, 1988) and as amicus curiae before the United States Court of Appeals for the Ninth Circuit in Associated General Contractors of California v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing en banc pending).

ity business opportunity programs. LAMWOB has supported minority business participation programs in New Orleans.

Amici MBELDEF and LAMWOB therefore have a significant interest in this Court's determination concerning the constitutionality of the Richmond Minority Business Utilization ("MBU") Plan.[3]

SUMMARY OF ARGUMENT

The remedial concept of minority business opportunity programs was born of the compelling interest of government to purge the final vestiges of

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[3] There are currently in excess of 160 state and local government minority business opportunity plans in effect nationwide that might be affected by the outcome of this case. See Minority Business Enterprise Legal Defense and Education Fund, Minority Business Enterprises: Programs of State and Local Governments, Academy for State and Local Government 2 (Jan. 1988) [hereinafter MBELDEF Report] (lodged with the Clerk of the Court and sent to the parties).

identified racial discrimination. Federal, state, and local minority business opportunity programs are aimed at meeting that goal by taking affirmative steps to create a level playing field in the realm of public procurement. The Richmond MBU Plan represents just such an effort by a responsible municipality to address pervasive discrimination within its public sector marketplace.

The district court found that the evidence before the Richmond City Council was sufficient to establish a compelling interest in remedying discrimination in public sector construction contracting. It also found that the MBU Plan was an appropriate means of addressing that interest. Finally, it found that plaintiff had failed to demonstrate that the plan would place an excessive burden on non-minority contractors in

contravention of their constitutional equal protection rights.

The Fourth Circuit committed legal error in reversing this well-reasoned district court opinion. First, it misinterpreted Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) to require that the Richmond City Council should have found past discrimination by Richmond against minority contractors in order to establish the City's compelling interest in remedying such discrimination. Wygant imposes no such condition. Rather, it requires only that Richmond had convincing evidence to support its conclusion that there was prior discrimination. The Fourth Circuit also failed to grant due deference to the district court's findings of facts and erroneously ascribed the burden of proof to Richmond notwithstanding plaintiff's failure to

introduce any evidence to rebut Richmond's showing of past discrimination.

Second, the Fourth Circuit erroneously concluded that the MBU Plan was not tailored narrowly enough to avoid violating the equal protection rights of non-minority contractors. In reaching this conclusion, the Fourth Circuit incorrectly applied scrutiny crafted for judicial review of layoff plans, with their direct and substantial harm to non-minority individuals, rather than the test this Court has adopted for review of minority business opportunity programs. In fact, as the district court properly concluded, the MBU Plan is narrowly tailored to the remedial goal of addressing discrimination in construction contracting. The limited burdens imposed on non-minority contractors are not violative of

the Fourteenth Amendment to the Constitution.

ARGUMENT

I.

THE COURT OF APPEALS DISREGARDED THE SIGNIFICANT AND COMPELLING GOVERNMENTAL PURPOSES SERVED BY MINORITY BUSINESS OPPORTUNITY PROGRAMS SUCH AS THE MBU PLAN

A. Readily Identifiable Private and Public Discrimination Has Impaired Minority Businesses' Access To Public Contracting Opportunities

It is uncontroverted that the combined effects of past and present, private and public discrimination have denied public contracting opportunities to minority-owned businesses. Although the discrimination at issue here may, at first glance, appear to be less direct than the more renowned Jim Crow segregation of public facilities -- it is not. The barriers to access resulting from private and public discrimination in the marketplace, and the accompanying fore-

closure of public contracting opportunities for minorities, are as real, and of the same invidious intent, as the notorious "For Whites Only" signs once found in public bathrooms and waiting rooms.

At the national level, empirical tests consistently indicate that discrimination has continued to injure the minority business community.[4] For example, although the nation's population is approximately fifteen percent minority, the most recent economic figures indicate that only five percent of the nation's businesses are minority-owned and that they receive only one-half percent of all contracting gross receipts.[5] Minority entrepreneurs still earn signif-

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[4] See Bates, Minority Business Set-Asides: Theory and Practice, 1 United States Commission On Civil Rights, Selected Affirmative Action Topics in Employment and Business Set-Asides 142, 147 (1985).

[5] See MBELDEF Report, supra note 2, at 2.

icantly less than non-minority entrepreneurs. Bates, supra note 4, at 149-150. Additionally, minority-owned businesses are less profitable, more highly leveraged and are much more likely to be undercapitalized.[6] But for the effects of racial discrimination, a free competitive market would not produce such varying levels of market performance along racial lines.

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[6] In 1944, Gunnar Myrdal observed:

> The Negro businessman, furthermore encounters greater difficulties [than whites] in securing credit. This is particularly due to the marginal position of negro business. It is also partly due to prejudiced opinions among whites concerning the business ability and personal reliability of Negroes. In either case a vicious circle is in operation keeping Negro business down.

Gunnar Myrdal, An American Dilemma 309 (1944).

Discriminatory barriers to minority-owned business participation have been particularly oppressive in the construction industry. Pervasive employment discrimination in the construction trades has prevented minorities from following the traditional path from laborer to entrepreneur.[7] The construction industry is characterized by an "old-boy network" in which white male general contractors work with a closely knit group of white male subcontractors to the exclusion of others.[8] The result of this

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[7] "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers v. Weber, 443 U.S. 193, 198 n.1 reh'g denied, 444 U.S. 889 (1979). See also Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C., 478 U.S. 421 (1986).

[8] United States Commission on Civil Rights, Greater Baltimore Commitment: A Study of Urban Minority Economic Development, 31 (1983) (quoting from G. Douglas Pugh, "Bonding Minority Contractors," in Black Economic Development 138-39 (W.F. Hoddard & G. D.

(Footnote continued)

exclusionary network is that, in the absence of governmental remedy, minority firms are precluded from significant participation in public contracting opportunities. Bates, supra note 4, at

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(Footnote 8 continued from previous page)

> Pugh, eds. 1969)) (Black contractors have been the victims of exclusionary practices of the construction craft unions, which have, in the past, denied them entry into the construction trades. . . . These exclusionary practices have made it almost impossible for black workers to acquire construction skills and to enter the construction business through the normal channel of graduating from skilled worker and foreman into small scale contracting and then, with the accumulation of experience and capital, into larger and more complex work. It has also made it impossible for black contractors to have available to them the quantities of skilled workers needed for larger enterprise. When to this pattern, is added lack of access to financing, the result is an almost total inability of black contractors to qualify for surety bonds needed for participation in most . . . public construction work. . . . Thus, black contractors find themselves in a kind of circular trap where their lack of experience in bonded work makes it virtually impossible to obtain surety bonds for construction work requiring such bonds and thereby gain experience on this type of work, even though they might otherwise have the ability to perform.).

148, 156.[9] Since much of this discrimination is localized, city and state governments have a particularly strong interest in structuring corrective programs.

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[9] The fact that "past impairment of minority-firm access to public contracting opportunities may have been an incidental consequence of 'business as usual' by public contracting agencies" is not sufficient to detract from a government's authority to take remedial action to remedy the impairment. Fullilove v. Klutznick, 448 U.S. 448, 484 (1980). Further, a 1974 Michigan sponsored study, "disclosed unfounded negative attitudes towards minority contractors by those [state] departments charged with the responsibility of awarding an enormous variety of contacts" even though the officials "had not had any actual experience with minority vendors." Michigan Road Builders Ass'n, Inc. v. Milliken, 571 F.Supp. 173, 179 (E.D. Mich. 1983), rev'd, 834 F.2d 583 (6th Cir. 1987). Based on this finding, the study concluded that absent formal state action the "negative attitude of State purchasing authorities toward minority vendors would cripple any steps toward achieving equity in the State's purchasing policies." Id. at 181.

B. Minority Business Opportunity Programs Seek to Remedy Procurement Practices Which Perpetuate the Effects of Discrimination

Minority business opportunity programs are intended to redress discriminatory barriers which have impaired opportunities for minorities in public procurement.[10] These programs are substantially related to the achievement of this goal: first, by attempting to place

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[10] Thirty-two states and 160 local governments have adopted minority business opportunity programs. MBELDEF Report, supra note 2, at 2. These programs can generally be divided into three categories. Some, such as Richmond's, require contractors to attempt to meet a goal for utilization of minority-owned subcontractors. Others establish sheltered markets for minority-owned businesses under certain limited circumstances. See, e.g., South Florida Chapter of the Assoc. Gen. Contractors of Am., Inc. v. Metropolitan Dade County, Fla., 723 F.2d 846, 848-49 (11th Cir.), cert. denied, 469 U.S. 871 (1984). Still others award points or credits for minority participation in determining contract awards, or provide financial and technical assistance. See, e.g., Ohio Rev. Code Ann. §§ 122.71-122.89 (Anderson 1984); Md. State Fin. & Proc. Code Ann. § 18-601 (1988).

minority-owned businesses on a more equitable footing with respect to public contracting opportunities, see, e.g., Fullilove, 448 U.S. at 485-86; and second, by fostering viable minority-owned businesses which, in turn, spur economic growth. Bates, supra note 4, at 142.

Contrary to the notion implicit in the Fourth Circuit's majority opinion, state and local minority business opportunity programs, such as Richmond's MBU Plan, have not been adopted in a lackadaisical fashion and do not reflect "the most casual deployment of race in the dispensation of public benefits." J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1362 (4th Cir. 1987), jur. noted 108 S.Ct. 1010 (1988) (No. 87-998). To the contrary, these programs are modeled after longstanding federal efforts, such as the Section 8(a) program of the Small

Business Act of 1953 ("SBA"), as amended, 15 U.S.C. § 637 (1988);[11] minority business programs developed by federal departments and agencies;[12] and federal legislation such as the Surface Transportation Assistance Act of 1982, Pub. L. 97-424, 96 Stat. 2098, 23 U.S.C. § 104, (1983) ("STAA") and the Public Works Employment Act of 1977, Pub. L. 95-28, 91

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[11] Under the SBA Section 8(a) program, federal contracts are directed to small businesses owned and controlled by "socially or economically disadvantaged" persons in order to assist these persons in achieving a competitive position in the economy. See Fullilove, 448 U.S. at 463-64. See also S. Rep. No. 1070, 95th Cong., 2d Sess. 7 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 3835, 3842.

[12] Although the federal programs differ from agency to agency, they have originated largely from a series of executive orders. See, e.g., Exec. Order No. 11,625, 3 C.F.R. § 616 (1971) (adopted as part of President Nixon's attempt to foster "black capitalism").

Stat. 116, 42 U.S.C. § 6701 ("PWEA").[13]

As demonstrated by the STAA and PWEA, and the large number of state and local programs that they fostered,[14] public construction contracts have been a particular area of emphasis for minority business opportunity programs. The emphasis on construction is appropriate because: (1) a sufficient number of minority-owned firms are available to per-

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[13] Section 105(f) of the STAA required, subject to certain waivers, that at least 10 percent of the funds appropriated under the Act be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by the Small Business Act.

[14] See, e.g., N.J. Stat. Ann. § 52.32-17, (West 1986 & Supp. 1987); Wis. Stat. Ann. §§ 16.75(3)(3m)(a), 16.87(2), 84.075 (West 1957).

form the required government contracts;[15] (2) the large volume and size of public construction contracts yields ample opportunity for minorities to obtain significant subcontracts and prime contracts

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[15] See, e.g., Senate Committee on Small Business, Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program (1987) [hereinafter Senate Small Business Report] (40 percent of respondents to survey of Section 8(a) graduate companies listed construction and related fields as their primary service at initial certification and 42 percent listed construction and related fields as their primary service after graduation from the program.) See also An Assessment of Program Impacts of the Disadvantaged Business Enterprise (DBE) Requirement in the Federal-Aid Highway Construction Program, (Draft Report, U.S. Department of Transportation, Federal Highway Administration, March 1986) [hereinafter Draft Report to D.O.T.] at 72-73 (43 percent of state transportation officials surveyed indicated that in 1982, prior to enactment of STAA, there were sufficient minority firms in their states to meet the Act's 10 percent goal, and more than 75 percent indicated that availability of minority firms increased after implementation of the STAA) (a copy is attached at tab A to the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court and sent to the parties).

without inappropriate burdens on non-minority-owned firms; and (3) minority business development efforts in the construction industry have a great potential for success because non-discriminatory barriers to entry in the subcontracting business are relatively low.[16]

When measured in terms of the number of contracts awarded and jobs created, the benefits to program participants, and the overall growth in the number of minority-owned firms, minority business opportunity programs have proven

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16. The use of subcontracting with its lesser demand on capital and expertise than prime contracting is an appropriate means of effectuating the goal of remedying the effects of discrimination. It is a particularly appropriate means where the objective, as well as the anticipated result, is that successful minority-owned companies will emerge as effective competitors for prime contracts. See also U.S. Commission on Civil Rights, Minorities and Women as Government Contractors 122 (1975).

effective. These programs have aided in the creation and expansion of thousands of minority enterprises in such fields as wholesaling, general construction, business services and large scale manufacturing.[17] The positive effects of these remedial programs have been produced at all levels of government and, more recently, have been duplicated in the private sector.

For example, the SBA Section 8(a) program has been highly successful. A survey of Section 8(a) graduate companies revealed: (1) the majority of the firms fell within the top quartile of the nation's minority-owned firms, see Senate

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[17] The success of minority business opportunity programs has been somewhat remarkable given the degree of resistance that the programs have engendered and the fact that the programs are new and still evolving. Consequently, some types of programs have proven more successful than others.

Small Business Report, supra note 15, at 15; and (2) more than one half of the firms continued to receive government and commercial contracts even when required to participate in competitive bidding, many from their previous Section 8(a) sources. Id. at 25, 33.

The Disadvantaged Business Enterprise ("DBE") requirement of STAA has proven equally effective.[18] From the three years immediately preceding STAA's passage to the three years immediately following, contract awards to disadvantaged business enterprises more than tripled from 9,450 to 32,500 with corre-

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[18] PWEA also was successful. Employment by black heavy construction contractors rose 122.5 percent from 1977 to 1982. Among black highway and street construction firms, receipts increased during the same period by 223.7 percent. These increases have been linked to PWEA. R. Suggs, Recent Changes in Black-Owned Business, Joint Center for Political Studies 12-13 (1986).

sponding values soaring from $1.03 billion to more than $3.26 billion.[19] Most states reported a doubling or tripling of the number of DBE firms certified for highway construction work between 1983 and 1984.[20]

In Massachusetts, an executive-ordered minority business opportunity plan containing set-aside provisions has produced spectacular results in only three years. From 1985 to 1987, procurement from minority firms more than dou-

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[19] See Betts and Giles, Dole Advocates Greater Business Opportunities, Foresees Minority Entrepreneurs Becoming Integral Part of the Transportation Industry, Minority Business Today, July, 1986, at 17, 18. (Minority Business Development Agency, U.S. Department of Commerce).

[20] See Draft Report of D.O.T., supra note 15, at 70 (including both existing firms which may not have previously been engaged in highway construction and new companies formed in response to the program).

bled.[21] As of 1987, Massachusetts let $146.5 million worth of business to minority-owned firms constituting 10.4 percent of all discretionary services purchased and 9.4 percent of all discretionary construction work purchased. Mass. Report at 1. Massachusetts contracting with minority-owned vendors increased from 368 firms in fiscal year 1984 to 813 firms in fiscal year 1987. Id. at 6.

Atlanta's adoption of a minority business opportunity plan is viewed as a vehicle for all its citizens to participate fully in the economic development of the Metropolitan Atlanta area.

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[21] See Minority Business Program FY87 Annual Report at 1 [hereinafter Mass. Report] (a copy is attached at tab B in the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court and sent to the parties).

Prior to Atlanta's adoption of a 25 percent minority-owned business participation goal in 1982, minority business participation in city contracting averaged about two percent. In 1987, minority-owned business participation exceeded 36 percent of all Atlanta city contracts.[22]

These programs have been emulated by quasi-public and private sector entities. Conrail's voluntary minority-owned business opportunity program graphically demonstrates the long-term competitive benefits derived from such programs. For calendar years 1982, 1983, 1984 and the first nine months of 1985

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[22] See Executive Summary: 1986 Office of Contract Compliance Annual Report (March 31, 1987) (a copy is attached at tab C to the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court and sent to the parties).

Conrail obtained savings of $3,589,727 on purchases from minority-owned businesses totalling $127,747,765.[23]

Accordingly, minority business opportunity programs have a demonstrated record of success as an important tool in eliminating the remaining barriers to equality in the marketplace. They create a positive environment in which minority-owned businesses can flourish and grow into viable competitive enterprises. The Fourth Circuit's flawed analysis should not be permitted to eviscerate these necessary measures.

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[23] See Affirmative Action Report of Consolidated Rail Corporation Ethics Committee (comparing similar purchasing from non-minority-owned business for a similar study period preceeding the affirmative action program) (a copy is attached as tab D to the Compendium of Minority Business Opportunity Plan Reports lodged with the Clerk of the Court and sent to the parties).

II.

RICHMOND'S MBU PLAN IS CONSTITUTIONAL

The Richmond Minority Business Utilization Plan represents a good faith effort by a responsible municipal government to address pervasive discrimination within its jurisdiction. Richmond acted in a manner mindful of the constitutional rights of non-minority contractors, such as Appellee Croson, who would be required to share the light burdens imposed to effectuate the MBU Plan's affirmative action goals. After determining that it had the authority and a compelling interest to enact a remedial program to address discrimination in public sector construction contracting, the Richmond City Council carefully studied the permissible parameters of affirmative action

programs as defined in Fullilove[24] and Bakke.[25] It then crafted a narrowly tailored minority business opportunity program -- the MBU Plan. Contrary to the Fourth Circuit's opinion, that Plan is entirely consistent with the standards established by this Court governing the constitutionality of such programs.

A. Richmond Had A Compelling Interest In Remedying Discrimination In Construction Contracting

The first requirement of a state-sponsored minority preference program is that it "must be justified by a

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[24] There, the Court found the Minority Business Enterprise provision, § 103(f)(2), of the Public Works Employment Act of 1977, 91 Stat. 116, 42 U.S.C. § 6705(f)(2) (Supp. II 1976) an appropriate balancing of the federal government's competing obligations to remedy pervasive discrimination in the construction industry nationwide and to treat non-minority contractors fairly. 448 U.S. at 480-89.

[25] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

compelling governmental interest." Wygant v. Jackson Bd. of Educ., 476 U.S. at 274 (1986) (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)). Wygant requires only that the state "ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." Id. at 277. Statistical disparities, among other indicia, may be sufficient to provide convincing evidence of prior discrimination. Id. at 292 (O'Connor, J., concurring). See also Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977).[26]

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[26] Contrary to the Fourth Circuit's interpretation, Wygant does not require an express contemporaneous finding by the state that it previously had engaged in discrimination. Justice O'Connor, concurring, stated that "a

(Footnote continued)

In this case, the district court found that the Richmond City Council had "ample evidence" of discrimination in public sector construction contracting to support its compelling interest in enacting a minority business opportunity plan. Supplemental Appendices to Jurisdictional Statement [hereinafter Supp. App.] at 172. It made this finding after reviewing the evidence considered by the City Council, including: (1) a statistical disparity between Richmond's

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(Footnote 26 continued from previous page)
contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." Wygant, 476 U.S. at 289. See also United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165-166 (1977); McDaniel v. Barresi, 402 U.S. 39, 41 (1971). Accordingly, the Fourth Circuit is wrong as a matter of law in finding the plan unconstitutional on the basis that Richmond did not admit and document its culpability for past discrimination against minority contractors.

50 percent minority population and its award of only 0.67 percent of its construction-contract dollars, over five years, to minority contractors;[27] (2) representations by construction trade associations that there were very few minority-owned businesses in their industry; (3) testimony by a city councillor and the city manager that there was discrimination on the basis of race in Richmond public sector construction contracting; and (4) congressional findings of

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[27] A similar statistical comparison was approved by this Court in Fullilove. There, the percentage of blacks in the United States population was compared with the percentage of black-owned businesses obtaining government construction contracts. Fullilove, 448 U.S. at 478. Such statistics are indicative of an environment in which "otherwise qualified" minority individuals and businesses are actively discouraged from participating as a result of a "self-recognized inability" to surmount the barrier of race. Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

nationwide discrimination in the construction industry. Supp. App. at 164-165. The district court also took judicial notice of historical barriers to entry by minority-owned businesses into the construction industry:

> The fact that very few minority construction businesses even exist is consistent with, not opposed to, a finding that minorities have suffered past discrimination in the [Richmond] area's construction industry. It suggests, of course, that past discrimination has stymied minority entry into the construction industry in general, as well as participation in [Richmond] government construction contracting in particular.

Supp. App. at 167.

Such findings may not be disturbed by an appellate court unless clearly erroneous.[28] In the instant

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[28] See Wygant, 476 U.S. at 277; Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Rogers v. Lodge, 458 U.S. 613, 623 (1982); Pullman-Standard v. Swint, 456 U.S. 273, 287-88 (1982); Fed. R. Civ. P. 52(a).

case, however, the Fourth Circuit failed to accord any deference to the district court's findings. Instead, it revisited the City Council's deliberations and substituted its own reactions to that record.[29] It did not, however, cite any evidence in the record -- and there is none -- establishing that the district court's findings were clearly erroneous.

For example, the district court found the statistical comparison between Richmond's minority population and minority participation in City construction

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[29] "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently." Anderson v. Bessemer City, 470 U.S. at 573-74 (1985). Moreover, if factual findings of a district court are inadequate a court of appeals should not find fact on its own, but rather should remand for further fact finding. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986).

contracts to be persuasive evidence of discrimination.[30] Strikingly, the Fourth Circuit declared the same statistical evidence "spurious." Croson, 822 F.2d at 1359. Additionally, the district court found that the testimony before the City Council supported the conclusion that "there was discrimination and exclusion on the basis of race in the construction industry, in both Richmond and the state." Supp. App. at 164-65. The Fourth Circuit found the same testimony "nearly weightless." Croson, 822 F.2d at 1359. Finally, the Fourth Circuit improperly disregarded the district court's judicial notice of barriers to entry and

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[30] Supp. App. at 168-69 ("dismally low level of minority business participation in City's prime contracts").

historical discrimination in Richmond. Supp. App. at 166.[31]

Accordingly, the district court's holding that there was ample evidence to establish that Richmond had a compelling interest in enacting the MBU Plan meets applicable legal standards and is supported by the record. The Fourth Circuit's contrary conclusion was based on an erroneous reading of Wygant and its own improper findings of fact.

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[31] There can be no doubt that Richmond committed such discrimination. For example, in Richmond "there has been state (also federal) action tending to perpetuate apartheid of the races. . . ." Bradley v. School Board of Richmond, 462 F.2d 1058, 1065 (4th Cir. 1972), aff'd, 412 U.S. 92 (by an equally divided court; Powell took no part in the consideration or decision), reh'g denied, 414 U.S. 884 (1973). After a "sordid history" of attempts to "circumvent, defeat, and nullify the holding of Brown I," Richmond did not take even "feeble steps" to implement school desegregation until 1963. Id. at 1074-75.

B. The MBU Plan Is Narrowly Tailored to Remedy Discrimination In Construction Contracting in Richmond

The second requirement of a state-sponsored affirmative action plan is that it "be 'narrowly tailored to the achievement of that goal.'" Wygant, 476 U.S. at 274; Fullilove, 448 U.S. at 480. When the state has demonstrated a compelling interest in remedying such discrimination, it is entitled to a presumption that the remedial action chosen is a proper method to address the discrimination. Wygant, 476 U.S. at 293 (O'Connor, J., concurring). Thus, "[t]he ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative-action program." Wygant, 476

U.S. at 277-78.[32] That presumption may be overcome only when the trial court, in its sound discretion, finds that the remedies selected "impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected." Id. at 287.

In the instant case, the district court concluded that "[p]laintiffs have not shown in any way how the burdens that the Plan may place on innocent third parties would be excessive as a constitu-

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[32] As this Court and others have recognized, it is of crucial importance to place the burdens of proof on the appropriate parties. See e.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (reversing on wrong burden); Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977); Toney v. Block, 705 F.2d 1364, 1367 (D.C. Cir. 1983).

tional matter." Supp. App. at 197.[33] The district court's analysis is well reasoned and reflected a proper exercise of its abundant discretion. It also is fully consistent with this Court's reasoning in Fullilove that

> by its objective of remedying the historical impairment of access, the [minority business opportunity program] can have the effect of awarding some contracts to [minority-owned businesses] which otherwise might be awarded to other businesses . . . . It is not a constitutional defect in [the

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[33] In reaching this conclusion the court balanced the reasonableness of a 30 percent set-aside in light of a 50 percent minority population, Supp. App. 173-80; the flexibility of the Plan given its "meaningful waiver provision," Supp. App. 181-93; the City Council's consideration of "the efficacy of alternative responses," Supp. App. 193-95; and the temporary nature of the Plan, Supp. App. 195; against "the burden on non-MBE prime contractors of seeking out MBE's to participate as subcontractors on City construction projects; and the burden on non-MBE subcontractors who would have received some of the City's construction contracting business but for the City's Plan." Supp. App. at 196-98.

> program] that it may disappoint the expectations of nonminority firms . . . such "a sharing of the burden" by innocent parties is not impermissible.

448 U.S. at 484 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976)). See also United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The Fourth Circuit disregarded this line of authority and mistakenly patterned its analysis of the MBU Plan's constitutionality on this Court's holding in Wygant that the Jackson Board of Educations's layoff plan violated the Fourteenth Amendment.[34] State-sponsored

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[34] The Fourth Circuit also misplaced the burden of proof regarding the constitutionality of the MBU Plan on Richmond. Once the state demonstrates a compelling interest, the plaintiff must prove the government's

> evidence did not support an inference of prior discrimination and thus a remedial purpose, or that

(Footnote continued)

layoff plans present special circumstances in which the State must "meet a heavy burden of justification." Wygant, 476 U.S. at 282 n.10. Accordingly, the scrutiny applied to layoff plans which "impose the entire burden of achieving racial equality on particular individuals," Wygant, 476 U.S. at 282-283, is very different from that applied to minority business opportunity plans where the "actual burden shouldered by nonminority firms is relatively light." Wy-

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(Footnote 34 continued from previous page)

> the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiff's establish a violation of their constitutional rights, and thereby defeat the presumption that the [state's] assertedly remedial action based on the statistical evidence was justified.

Wygant, 476 U.S. at 293 (O'Connor, J., concurring).

gant, 476 U.S. at 282 (quoting Fullilove, 448 U.S. at 484); see also Johnson v. Transp. Agency, 107 S.Ct. 1442, 1451 (1987); Weber, 443 U.S. at 208.

As a result of its failure to recognize this distinction, the Fourth Circuit applied the wrong standard in analyzing the constitutionality of the MBU Plan. Its conclusion that the burdens imposed by the Plan on non-minority contractors deprives those contractors of equal protection under the law directly conflicts with well established authority. The Fourth Circuit's decision therefore should be reversed.

III

IF THIS COURT AFFIRMS THE FOURTH CIRCUIT THE PRACTICAL RESULT WILL BE TO RENDER MINORITY BUSINESS OPPORTUNITY PROGRAMS INEFFECTIVE

As demonstrated above, minority business opportunity programs are an

effective tool in state and local efforts to eradicate discrimination-based barriers which have impaired the access of minority-owned firms to public contracts. An affirmance of the court of appeal's decision will have a chilling impact on the continuing effectiveness of these necessary programs.

The Fourth Circuit's majority opinion would effectively preclude state and local governments from adopting any minority business opportunity program absent an admission of prior discrimination. Such a requirement is likely to thwart governmental efforts to remedy past discrimination. As Justice O'Connor explained: "[T]he imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severe-

ly undermine public employers' incentive to meet voluntarily their civil rights obligations." Wygant, 476 U.S. at 290 (O'Connor, J., concurring). See, e.g., Johnson, 107 S.Ct. at 1451 n.8.

In addition, if the Court upholds the notion that set-aside provisions in minority business opportunity programs must be based on the small percentage of existing minority-owned firms, such programs will perpetuate, rather than remedy, discrimination. As Judge Sprouse argued in dissent below, under such a limited scope for minority opportunity programs, "truly pernicious discrimination could have the compound effect of blocking remedial action." Croson, 822 F.2d at 1365 n.11 (Sprouse, J., dissenting).

Finally, if the same "heavy burden for justification" is placed on

minority business opportunity programs as is placed on layoff plans, it will be virtually impossible to draft a minority business opportunity plan which can both remedy discrimination effectively and withstand constitutional scrutiny.

Accordingly, a decision by this Court to affirm the Fourth Circuit will, as a practical matter, deprive state and local government of effective use of minority business opportunity plans to remedy economic discrimination within their jurisdictions.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

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